STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE CORRECTIONAL OFFICERS ASSOCIATION,	:	
Petitioner,	:	
v.	:	U.L.P. No. 95-03-121
STATE OF DELAWARE, DEPARTMENT OF CORRECTION,	:	U.L.P. No. 95-03-124
Respondent.	:	

PROBABLE CAUSE DETERMINATION

The Delaware Correctional Officers Association ("DCOA" or "Union") is an employee organization within the meaning of Section 1302(h) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994). DCOA is the exclusive bargaining representative of employees in the State's Adult Correctional Institutions within the meaning of Section 1302(i). The State of Delaware, Department of Correction ("Employer") is a public employer within the meaning of Section 1302(m), of the PERA.

DCOA filed the above-captioned unfair labor practice charges with the Public Employment Relations Board ("PERB") on March 13, 1995, and March 30, 1995, respectively. The charges allege violations of Article 1307, Unfair Labor Practices, (a)(1), (2), (5), (6) and (7), of the Public Employment Relations Act, 19 Del.C. 13 (1984), ("Act") which provide[1]:

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

[1] Charge 121 alleges violations of Sections (a)(1), (2), (5), (6) and (7), of the Act. Charge 124 alleges violations of Sections (a)(1), (2), (5) and (6) of the Act.

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this Chapter.

(2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

(6) Refuse or fail to comply with any provision of this Chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining unit this Chapter.

(7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

BACKGROUND

Charge 121 alleges that on March 3, 1995, two (2) employees were required to work and as a result were denied the opportunity to participate in the negotiations. A third employee was not allowed to remain at the meeting until the close of the negotiations. Had all three (3) employees fully participated in the negotiating session there would have been only ten (10) representatives at the table for the Petitioner instead of the eleven (11) provided for in the Ground Rules.

In its Answer to Charge 121, the Respondent denies the allegations maintaining that: (1) one employee worked solely because she volunteered to do so; (2) a second employee was required by the Respondent to leave the negotiations at 2:15 p.m. in order to report for his scheduled shift at 3:00 p.m.[2]

In its Answer to Charge 124, the Respondent denies the allegation

[2] Each charge also alleges a prior similar incident in October, 1994, to which the Petitioner argues it is unable to respond for lack of specificity.

maintaining that other options were available to the Petitioner including arranging for another employee to cover the employee's scheduled shift.

In each Answer, the Respondent argues that even if Petitioner's allegations had merit, "they would be insufficient to demonstrate either by way of 'single event' or by 'pattern or practice' impact, any violation of 19 Del.C. §1307 (a)(1), (a)(2), (a)(5) or (a)(6)."

The Respondent also argues that the Petitioner has neither claimed nor shown that the negotiations were in any way hindered or frustrated as the result of the alleged conduct.

OPINION

Article V of the Board's Rules and Regulations provides, in relevant part:

> 5.6 Decision or Probable Cause Determination
>
> (a) Upon review of the Complaint, Answer and Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or the submission of briefs.

The Complaints allege only that the State's action failed to comply with the agreed upon Ground Rules. The pleadings provide no basis for concluding that the alleged conduct, if proven, interfered with, restrained or coerced any employee "in or because of the exercise of any rights guaranteed under this Chapter," as prohibited by 1307(a)(1). Nor do the allegations, considered in a light most favorable to the Petitioner, reasonably support a conclusion that the State dominated, interfered with or assisted in the

formation, existence or administration of the Association, as prohibited by 1307(a)(2) or that the State refused to reduce to writing any agreement reached as a result of collective bargaining and to sign the resulting contract, as required by 1307(a)(7).

Therefore, no violation of the Act or the Rules and Regulations promulgated by the Board, as prohibited by 1307(a)(6), of the Act, has occurred unless the alleged conduct constitutes a violation by the State its duty to bargain in good faith, as required by 1307(a)(5), of the Act.

The PERB has determined that incidental conduct may be so inherently destructive of the bargaining requirement as to constitute a per se violation of the duty to bargain in good faith. Examples of per se violations include the unilateral change in the status quo of a mandatory subject of bargaining such as the refusal to process a grievance as required by the negotiated grievance procedure (Red Clay Ed. Assn. v. Bd. of Ed. Del. PERB, U.L.P. No. 90-09-053 (1990); and (2), unilaterally changing existing benefit plans (New Castle County Vo-Tech. Ed. Assn. v. New Castle County Vo-Tech School District, Del. PERB U.L.P. No. 85-05-025 (1985)). In order to rise to the level of a per se violation of the duty to bargain incidental conduct must be so egregious as to preclude meaningful negotiation. Here, the negotiation sessions occurred as scheduled and there is no allegation that the absence of the specified individuals rendered the meetings meaningless. Therefore, incidents of the type alleged in Charge 121 and Charge 124 do not constitute a per se violation of the duty to bargain.

In the absence of a per se violation, the PERB has held that when determining whether conduct violates the duty to bargain:

> ...it is necessary to examine the "totality of conduct" of the parties in ruling on alleged violations of the duty to bargain in good faith.

Seaford Ed. Assn. v. Bd. of Ed. Del. PERB, U.L.P. 2-2-84S (3/19/84). The test of "good faith" is a fluctuating one, "dependent on part upon how a reasonable man might be expected to react to the bargaining attitude by those across the table." Times Publishing Co. v. NLRB, 72 NLRB 676, 19 LRRM 1199 (1947). In further defining the criteria for determining whether a party has engaged in "good faith bargaining" the PERB has held:

> ...The validity of a single position can only be ascertained from the overall record. While a party's posture as it relates to a particular subject, in and of itself might qualify as an unfair labor practice, viewed in light of the continuing and evolving negotiations process, it may well prove otherwise. Seaford (Supra. at Pg. 7) [emphasis added] Red Clay Ed. Assn. v. Bd. of Ed., Del. PERB, U.L.P. 90-06-051 (1990).

The Ground Rules agreed to by the parties on May 18, 1994, also provide:

> 2. The first meeting will be Wednesday, May 18, 1994, at 9:30 a.m. Thereafter, we will meet every Thursday, if possible, at 9:30 a.m. until the collective bargaining is completed.

In fact, collective bargaining commenced on April 21, 1994, (Para. 3 of the Complaints) approximately eleven (11) months or forty-four (44 weeks prior to the disputed incidents. There is no allegation that compliance with Item No. 2 of the Ground Rules has been a problem or that negotiations have not otherwise progressed in an acceptable manner. To the contrary, the sole allegation supporting the alleged violation of the duty to bargain is that on three (3) occasions a limited number of the Petitioner's negotiating team was required to work.

In its Response to New Matter, the Petitioner denies the Employer's claim that the reasons for the absences of the employees from the negotiating sessions were beyond its control. Regardless of the reason(s) for the absences, Charge 121 and Charge 124, either singularly or considered together, fail to satisfy the "totality of the conduct" requirement established in Seaford (Supra.) as necessary for a violation of either 1307(a)(5) or (b)(5).

DECISION

Based upon the foregoing, it is determined that pursuant to Rule 5.6, Decision or Probable Cause Determination, of the Rules and Regulations of the Public Employment Relations Board, the pleadings in Charge 121 and Charge 124 fail to support a finding of probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (a)(2), (a)(5), (a)(6) or (a)(7), has occurred.

Accordingly, the charges are dismissed.

IT IS SO ORDERED.

DATED: August 31, 1995

/s/Charles D. Long, Jr.
Executive Director
Del. Public Employment Relations Bd.